Therefore, Appellant, Sean Flaharty, respectfully requests this Court to reverse the trial court's grant of summary judgment and final judgment in favor of Digital Design Group, and to remand this case for a trial on the merits.

Applicant Details

First Name	**Gabriel**
Last Name	**Valle**
Citizenship Status	**U. S. Citizen**
Email Address	**gav21@georgetown.edu**
Address	**Address** Street **800 Mott Hill Rd** City **South Glastonbury** State/Territory **Connecticut** Zip **06073** Country **United States**
Contact Phone Number	**6179011507**

Applicant Education

BA/BS From	**Boston College**
Date of BA/BS	**May 2020**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 21, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Immigration Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Loiselle Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Krishnakumar, Anita
anita.krishnakumar@georgetown.edu
Snyder, Brad
brad.snyder@law.georgetown.edu
Levitin, Adam
ajl53@georgetown.edu
202.662.9234

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Gabriel A. Valle
800 Mott Hill Road
South Glastonbury, CT 06073

The Honorable Judge James O. Browning
United States District Court
Pete V. Domenici United States Courthouse
333 Lomas Blvd NW, Suite 660
Albuquerque, New Mexico 87102

Dear Judge Browning,

I am a recent graduate of the Georgetown University Law Center *Cum Laude* and supervising editor on the *Georgetown Immigration Law Journal*. I am writing to apply for a 2024 clerkship in your chambers. I am eager to clerk in your chambers for the opportunity to learn from and have as a mentor someone who has clerked at the Supreme Court and earned a record as a fair and honest jurist.

My parents came to the United States from Latin America, and I am the first in my immediate family to pursue a law degree. What drew me to law school was the unique ability of lawyers to take printed words in a statute or amendment and through their writing and oral advocacy skills animate the values encapsulated on the page for their clients. Eventually I hope to work as a government attorney and pursue a career in public service.

I specifically would like to work at the district court level because it offers an unparalleled view of litigation. By working at the trial level, clerks get to see a range of motions, writing styles, trial mechanics such as evidence objections, and trial advocacy styles. Getting to see this within my first few years as a lawyer would be invaluable for my growth.

Included with this letter are my resume, law school transcript, and writing samples. Three letters of recommendation are attached and are from the following professors:

1. Professor Anita Krishnakumar, Anne Fleming Research Professor at Georgetown University Law Center
    - She can be reached at anita.krishnakumar@georgetown.edu.
2. Professor Brad Snyder, Anne Fleming Research Professor at Georgetown University Law Center
    - He can be reached at brad.snyder@georgetown.edu.
3. Professor Adam J. Levitin, Anne Fleming Research Professor at Georgetown University Law Center.
    - He can be reached at: ajl53@georgetown.edu.

Thank you very much for your time and consideration. Should you have any more questions, I am more than happy to answer! My email address is gav21@georgetown.edu and my cell phone number is (617) 901-1507.

All the Best,
Gabriel Valle

Gabriel A. Valle

Gav21@georgetown.edu | 617-901-1507
800 Mott Hill Road
South Glastonbury, CT 06073

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER *Washington, D.C.*
Juris Doctor May 2023
GPA - 3.77
Honors: *Cum Laude*
Publications: *A Hero Forgotten: Gus Garcia and the Litigation of Hernandez v. Texas*, selected for publication in the *Journal of Supreme Court History*, Spring 2023.
Activities: Research Assistant for Professor Kevin Tobia; Georgetown Civil Litigation Clinic, Spring 2023; Supervising Editor, Georgetown Immigration Law Journal.

UNIVERSITY OF CONNECTICUT SCHOOL OF LAW *Hartford, CT*
First-Year J.D. Coursework Completed August 2020 - May 2021
Activities: Quarterfinalist in Loiselle Moot Court Competition; Connecticut Moot Court Executive Board Member; Latino Law Student Association Member.

BOSTON COLLEGE, MORRISSEY COLLEGE OF ARTS AND SCIENCES *Chestnut Hill, MA*
Bachelor of Arts in History & Music May 2020
Honors: Father Frank T. Kennedy Award for Academic Excellence in Music recipient (2020); Dean's List High Honors; Dean's List Honors.
Activities: Published in Bellarmine Law Society Journal (2018); Co-President of BC Symphony Orchestra E-Board (2017-20); Boston College Music Department Senior Seminar Colloquium; Boston College Cadigan Alumni Center Caller.
Thesis: *The Brutality of Southern Justice: The Origination, Institutionalization, and Transformation of Lynching in the American South*.

CHOATE ROSEMARY HALL *Wallingford, CT*
Honors: Hicks Lawrence Prize in Music (2016); Dean's List 2013-2016. May 2016
Activities: Varsity Mens Swimming (2014-16); Arts Concentration Program (2013-16).

EXPERIENCE

Georgetown University Law Center; Washington, D.C. January 2023 - Present
Civil Litigation Clinic

- Drafted the Convention Against Torture section of a forty-five-page brief to be filed before the Board of Immigration Appeals concerning a motion to reopen a Convention Against Torture Claim based on ineffective assistance of counsel on remand from the Second Circuit.
- Prepared a four-page memorandum on probable cause in the District of Columbia when the officers in question suspected trespass. Specifically, the memorandum compared and distinguished the facts of the clinic's case from *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

Georgetown University Law Center; Washington, D.C. January 2023 – Present
Research Assistant to Professor Tobia

- Surveyed over three hundred both electronic and physical sources, comparing contemporary interpretations of each section of the Constitution with their original public meaning.
- Compiled an excel spreadsheet of over sixty academic articles demonstrating how contemporary interpretation of a specific clause or amendment of the Constitution is not in line with its original meaning.

Kirkland & Ellis; New York, New York May – July 2022
Summer Associate (Accepted offer to return as a full-time associate).

- Completed a docket review of over 900 motions filed in support of Nordic Aviation Capital's Chapter 11 Bankruptcy in the Eastern District of Virginia, including a spreadsheet of all motions filed by Kirkland & Ellis to ensure correct billing.
- Researched congressional testimony on the legality of divisive mergers in connection with solvent companies filing for bankruptcy when facing wide-spread toxic tort liability.

SKILLS AND INTERESTS

- Proficient in Spanish, French, and elementary Latin.
- Violin, History (American, Music, and European), Classical Music, 60s/70s Music, Cooking, Travel, Swimming, Tennis.

Record of: Gabriel Alexandre Valle
GUID: 807324186

Course Level: Juris Doctor

Transfer Credit:
University of Connecticut
School Total: 31.00
Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1264	05	Professional Responsibility: Ethics in Public Interest Practice	3.00	B	9.00	
			Michael Kirkpatrick				
LAWJ	1647	05	Warren Court Legal History Seminar	3.00	A	12.00	
			Brad Snyder				
LAWJ	195	05	Election Law: Voting, Campaigning and the Law	3.00	A	12.00	
			Paul Smith				
LAWJ	545	08	Financial Restructuring and Bankruptcy	4.00	A-	14.68	
			Adam Levitin				

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	47.68	3.67
Cumulative	44.00	13.00	47.68	3.67

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	025	05	Administrative Law	3.00	A	12.00	
			Anita Krishnakumar				
LAWJ	121	09	Corporations	4.00	A-	14.68	
			Michael Diamond				
LAWJ	1316	05	Bankruptcy Advocacy	4.00	A	16.00	
			David Kuney				
LAWJ	1778	08	Judicial Selection Process and Reforming the Supreme Court Seminar	2.00	A-	7.34	
			Nan Aron				
LAWJ	264	05	Labor Law: Union Organizing, Collective Bargaining, and Unfair Labor Practices	3.00	A-	11.01	
			Jonathan Fritts				

	EHrs	QHrs	QPts	GPA
Current	16.00	16.00	61.03	3.81
Annual	29.00	29.00	108.71	3.75
Cumulative	60.00	29.00	108.71	3.75

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	165	02	Evidence	4.00	A-	14.68	
			Michael Pardo				
LAWJ	1782	08	Statutory Interpretation Theory Seminar	2.00	A	8.00	
			Anita Krishnakumar				
LAWJ	1790	08	Shareholder Power, Voting, and the Governance of Firms Seminar	2.00	A-	7.34	
			Jonathon Zytnick				
LAWJ	263	09	Employment Law	3.00	A-	11.01	
			Brishen Rogers				
LAWJ	430	05	Recent Books on the Constitution Seminar	2.00	A	8.00	
			Randy Barnett				

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	49.03	3.77
Cumulative	73.00	42.00	157.74	3.76

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	052	05	Fourteenth Amendment Seminar	3.00	A	12.00	
LAWJ	1494	05	Civil Litigation Clinic	6.00	A	24.00	
LAWJ	178	05	Federal Courts and the Federal System	3.00	B+	9.99	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	45.99	3.83
Annual	25.00	25.00	95.02	3.80
Cumulative	85.00	54.00	203.73	3.77

End of Juris Doctor Record

BOSTON COLLEGE

Office of Student Services
Academic Transcript

Boston College
Office of Student Services
Lyons Hall 103
140 Commonwealth Avenue
Chestnut Hill, MA 02467

NAME: GABRIEL ALEXANDRE VALLE
SCHOOL: MORRISSEY COLLEGE OF ARTS AND SCIENCES
DEGREE: BACHELOR OF ARTS 05/18/2020
MAJORS: HISTORY, MUSIC

STUDENT ID#: 37804724
DATE PRINTED: 04/28/2022

ADVANCED PLACEMENT

HSXX1076	AMERICAN HISTORY EQUIV		

FALL 2016 ARTS & SCIENCES

BIOL2000	MOLECULES AND CELLS	03	C+
CHEM1109	GENERAL CHEMISTRY I	03	W
CHEM1111	GENERAL CHEM LAB I	01	B-
MATH1100	CALCULUS I	04	B-
MUSA1200	INTRO TO MUSIC	03	A
UNCS2245	FRESHMAN TOPIC SEMINARS	01	P

EARNED CREDITS: 12 GPA: 2.940

SPRING 2017 ARTS & SCIENCES

BIOL2010	ECOLOGY AND EVOLUTION	03	C-
CHEM1112	GENERAL CHEM LAB II	01	B-
ENGL1010	FIRST YEAR WRITING SEM	03	B+
MATH1101	CALCULUS II	04	W
MUSA2100	HARMONY	03	B+

EARNED CREDITS: 10 GPA: 2.766

SUMMER 2017 ARTS & SCIENCES

HIST1027	MODERN HISTORY I	03	A-
PSYC2234	ABNORMAL PSYCHOLOGY	03	A

EARNED CREDITS: 06 GPA: 3.835

FALL 2017 ARTS & SCIENCES

CHEM1109	GENERAL CHEMISTRY I	03	C-
HIST1001	EUROPE IN THE WORLD I	03	C+
MUSA3275	JOHANNES BRAHMS	03	A
PSYC2272	COGNITIVE PSYCHOLOGY	03	C+
SLAV2162	CLASSICS/ RUSS LIT -ENGL	03	B+

EARNED CREDITS: 15 GPA: 2.732

SPRING 2018 ARTS & SCIENCES

HIST1002	EUROPE IN THE WORLD II	03	A
HIST2402	U.S. HISTORY II	03	A-
HIST3467	U.S. BILL OF RIGHTS	03	A
BSLW1021	LAW I/INTRO TO LAW	03	B+
MUSP1925	IND INSTRUMENT/VOCAL INST	01	P
MUSA3270	BEETHOVEN	03	A

EARNED CREDITS: 16 GPA: 3.800

----------END OF COLUMN----------

FALL 2018 ARTS & SCIENCES

HIST2051	MODERN CHINA	03	A-
HIST2455	AMERICAN FASCISMS	03	B+
HIST4552	RACE, RIGHTS AND THE LAW	03	A-
MUSA1090	EAR TRAING/SIGHT-SING LAB	01	P
MUSP1925	IND INSTRUMENT/VOCAL INST	01	P
MUSA3100	CHROMATIC HARMONY	03	B-
MUSA3221	CHAMBER MUSIC	03	A
PHIL1070	PHILOSOPHY OF PERSON I	03	A-

EARNED CREDITS: 20 GPA: 3.502

SPRING 2019 ARTS & SCIENCES

HIST4371	INQUISITION/SPAIN&SPANAM	03	A-
HIST4297	RUSSIA TO 1917	03	B+
HIST4462	US CONSTITUTIONAL HIST II	03	A-
MUSA2090	ADV EAR TRAING/SIGHT SING	01	P
MUSP1925	IND INSTRUMENT/VOCAL INST	01	P
MUSA3110	FORM AND ANALYSIS	03	B+
MUSA2306	MUSICS OF AFRICA	03	B+
PHIL1071	PHILOSOPHY OF PERSON II	03	A-

EARNED CREDITS: 20 GPA: 3.500

FALL 2019 ARTS & SCIENCES

HIST4961	HONORS SEMINAR	03	A-
MUSP1925	IND INSTRUMENT/VOCAL INST	01	P
MUSA2205	MUSIC/CLASSIC PERIOD	03	A-
MUSA2209	MUSIC OF THE MODERN ERA	03	B+
MUSA3106	COUNTERPOINT	03	A-
MUSA4941	SENIOR SEMINAR	04	A-
THEO1401	ENGAGING CATHOLICISM	03	A

EARNED CREDITS: 20 GPA: 3.668

----------CONTINUED NEXT PAGE----------

ISSUED TO : GABRIEL ALEXANDRE VALLE
800 Mott Hill Rd
South Glastonbury CT 06073

Mary French
Unofficial without signature
Mary French, Registrar

BOSTON COLLEGE

Office of Student Services
Academic Transcript

Boston College
Office of Student Services
Lyons Hall 103
140 Commonwealth Avenue
Chestnut Hill, MA 02467

NAME: GABRIEL ALEXANDRE VALLE
SCHOOL: MORRISSEY COLLEGE OF ARTS AND SCIENCES
DEGREE: BACHELOR OF ARTS 05/18/2020
MAJORS: HISTORY, MUSIC

STUDENT ID#: 37804724
DATE PRINTED: 04/28/2022

SPRING 2020 ARTS & SCIENCES

HIST4451	CHURCH&STATE IN AMERICA	03	A
HIST4962	HONORS THESIS	03	A
MUSA3350	THE BEATLES	03	A
POLI1061	INTRO TO AMER POLITICS	03	B+
FREN1110	INTERMEDIATE FRENCH II	03	P
SOCY1030	DEVIANCE/SOC CONTROL	03	A-
THEO1433	CHINESE REL. XIANITY DIAL	03	A

EARNED CREDITS: 21 GPA: 3.833

TOTAL EARNED CREDITS: 140 GPA: 3.429

END OF RECORD

ISSUED TO : GABRIEL ALEXANDRE VALLE
800 Mott Hill Rd
South Glastonbury CT 06073

Mary French
Unofficial without signature
Mary French, Registrar

University of Connecticut

Unofficial Transcript

Name: Gabriel Valle
Student ID: 2432250

Print Date: 06/23/2021

End of Unofficial Transcript

Beginning of Law Record

Fall 2020 (2020-08-31 - 2020-12-22)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7500	Civil Procedure	4.00	4.00	B+	13.200
LAW	7505	Contracts	4.00	4.00	A	16.000
LAW	7510	Criminal Law	3.00	3.00	A-	11.100
LAW	7518	Lgl Practice: Rsrch & Writing	3.00	3.00	B	9.000
LAW	7530	Torts	3.00	3.00	A	12.000

			Attempted	Earned	GPA Units	Points
Semester GPA	3.606	Semester Totals	17.00	17.00	17.00	61.300
Cumulative GPA	3.606	Cumulative Totals	17.00	17.00	17.00	61.300

Spring2021
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7519	Lgl Practice: Negotiation	1.00	1.00	HP	0.000
LAW	7520	Lgl Practice: Intrv,Cnsl & Adv	3.00	3.00	B	9.000
LAW	7525	Property	4.00	4.00	B+	13.200
LAW	7540	Constitutional Law, An Intro	4.00	4.00	B	12.000
LAW	7655	Employment Discrimination Law	3.00	3.00	A	12.000

Class rank: 2nd Quintile (3.468-3.268)

			Attempted	Earned	GPA Units	Points
Semester GPA	3.300	Semester Totals	15.00	15.00	14.00	46.200
Cumulative GPA	3.468	Cumulative Totals	32.00	32.00	31.00	107.500

Fall 2021 (2021-08-30 - 2021-12-21)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7565	Legal Profession	3.00	0.00		0.000
LAW	7609	Clinic: Asylum and Human Rts.	4.00	0.00		0.000
LAW	7610	Clinic: Asy/Hum Rights Field	5.00	0.00		0.000

			Attempted	Earned	GPA Units	Points
Semester GPA	0.000	Semester Totals	12.00	0.00	0.00	0.000
Cumulative GPA	3.468	Cumulative Totals	44.00	32.00	31.00	107.500

Elected to Membership: CT Moot Court Board

Law Career Totals

Cumulative GPA	3.468	Cumulative Totals	44.00	32.00	31.00	107.500

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 23, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

It gives me great pleasure to recommend Gabriel Valle, who has applied to serve as a law clerk in your chambers. Gabe is incredibly smart, inquisitive, and thoughtful—a stellar student and a lovely human being. I believe he would make an excellent law clerk and would bring a wonderful perspective to your chambers.

I got to know Gabe over the 2021-2023 academic years, when he was a student in my Administrative Law class and later in my Statutory Interpretation seminar. The seminar had only 22 students and involved a lot of in-class discussion as well as written student critiques of papers, books, and articles, so I got to know the students quite well. During that class, I spoke regularly with Gabe in class and in office hours. Gabe's comments about the class readings were always top-notch—both highly thoughtful and well-written. He displayed an excellent grasp of the material and an ability to engage in nuanced thinking about both the authors' topics and his classmates' reactions to them. Gabe's comments also stood out because of his kindness and grace when he disagreed with an author or classmate. It was an absolute pleasure to have Gabe in class—he was one of those rare students I knew I could count on to answer difficult questions and take our class discussions to the next level.

Beyond his excellence in the classroom, Gabe is a wonderful human being and a delight to interact with. The child of immigrants, Gabe has worked hard his entire life and demonstrates genuine dedication and sincerity in his dealings with teachers and classmates. Both in college and in law school, Gabe has shown an admirable ability to balance rigorous academics with outside interests and service to others. In addition to maintaining top grades in law school, Gabe is, for example, also an accomplished violinist, who has played for 18 years. In college, he was a double major—in both history and music—and served as Co-President of the Boston College Symphony Orchestra E-Board. In law school, he has managed to earn excellent grades while serving as a Supervising Editor for the Georgetown Immigration Law Journal, a research assistant for Professor Kevin Tobia, and providing legal services through the Georgetown Civil Litigation Clinic. Finally, Gabe's longstanding love of history is palpable in a paper he wrote for a legal history seminar taught by one of my colleagues—it is an engaging, excellent piece of scholarship that has been chosen for publication in the Journal of Supreme Court History. In addition, he is just a pleasure to converse with—respectful, mature, incredibly curious, and deeply thoughtful.

In short, Gabe would make a terrific law clerk—he is sharp, diligent, reliable, and a joy to work with. If you give him the opportunity, I have no doubt that he will be one of your hardest workers, as well as a thoughtful and respected colleague. He is an excellent student and human being, and I expect that he will have a very successful legal career. I hope that he gets the chance to begin it by working for you.

Thank you for considering this recommendation, and please let me know if I can provide any additional information about Gabe that would assist you.

Sincerely,

Anita S. Krishnakumar
Anne Fleming Research Professor
Georgetown University Law Center
anita.krishnakumar@georgetown.edu
(917) 592-4561

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 23, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I highly recommend Gabriel Valle for a judicial clerkship. During the spring of 2021, Gabe was in my 12-person Warren Court seminar. Students used the justices' papers at the Library of Congress to write original research papers about the Warren Court's justices and underexplored cases. Usually, my students choose from a list of suggested topics based on my knowledge of the field and underexplored areas of law. Gabe, however, proposed his own topic – Mexican-American attorney Gus Garcia's successful challenge of the exclusion of Mexican Americans from Texas juries resulting in the 1954 Supreme Court decision in *Hernandez v. Texas*. I immediately agreed.

Gabe told Garcia's fascinating bottom-up story by using Garcia's papers at the University of Texas and Texas newspapers that have been digitized and are on microfilm. He also dug deep into the justices' papers at the Library of Congress and discovered an important certiorari memorandum by Warren's senior law clerk James C.N. Paul suggesting that the Court ask for a reply from the state. He also found memoranda on the case from Warren's law clerk Richard Flynn and Justice Douglas's law clerk James F. Crafts. As a result of these memoranda, the Court granted certiorari and, after briefing and argument from Garcia and co-counsel, found Texas in violation of the Fourteenth Amendment. Gabe takes the reader behind the scenes as the new chief justice accepts advice from Justice Frankfurter about how to write the opinion so as not to create more backlash in the wake of *Brown v. Board of Education* – which was decided two weeks before Hernandez. Finally, Gabe revealed that after his momentous victory, Garcia battled alcoholism and died penniless ten years later.

Gabe's paper, "A Hero Forgotten: Gus Garcia and the Litigation of Hernandez v. Texas," makes a major historical contribution in recovering the story of Gus Garcia and why *Hernandez v. Texas* did not ignite a movement for Mexican-American rights the way that *Brown v. Board of Education* did for the rights of African Americans. In June 2023, the article was published in Volume 48, Number 1 of the Journal of Supreme Court History. I am not surprised. It is well-researched, well-written, and a first-rate work of legal scholarship.

Gabe is a terrific candidate for a judicial clerkship. After transferring from the University of Connecticut Law School, he hit the ground running at Georgetown and received an A in Paul Smith's Election Law class. He is a supervisory editor of the *Georgetown Immigration Law Journal*. He has worked at three different law firms – most recently at Kirkland & Ellis's New York office during the summer of 2022.

On a personal level, Gabe is first rate. I greatly enjoyed our conversations in my office about constitutional law and about his paper. He was very open to my research and editorial suggestions and made the paper substantially better through multiple revisions. He is a hard worker, a listener, intellectually curious, and a people person. He does not have a sense of entitlement of many elite law students and offers his opinions in class with intelligence and grace. He will get along extremely well with his co-clerks and the judge.

Even though he went a straight from college to law school, Gabe has a tremendous amount of maturity and poise. In a few years' time, he will be the whole package. You will not regret hiring him. Please interview Gabe Valle for a clerkship.

Sincerely,

Brad Snyder
Professor of Law

Brad Snyder - brad.snyder@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 23, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am pleased to recommend Gabriel Valle for a clerkship in your chambers. I give him my most enthusiastic recommendation.

Gabriel was my student in a course in Financial Restructuring and Bankruptcy at Georgetown Law in the fall of 2021. The course covers both out-of-court restructuring transactions and in-court restructuring in Chapter 11 bankruptcies.

Gabriel was consistently an enthusiastic and valuable class participant. Gabriel's outstanding in-class performance was matched by his strong exam performance, for which he received an A-. Gabriel was not only a thoughtful in-class participant, but he would regularly ask insightful questions in after-class follow-ups and emails that displayed creative thinking and an extension of the materials he learned in class to other applications.

For example, Gabriel followed up with a great question regarding a brief in-class discussion of rights offerings in Chapter 11 plans. A rights offering is a way for debtor firm to raise capital by selling the option to purchase its equity interest. Gabriel recognized that there is a seeming incompatibility between the standard use of rights offerings, in which only certain classes of creditors are invited to participate, and the Supreme Court's market-test requirement for "new value" plans in Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'Ship, 526 U.S. 434 (1999). This turns out to be a knotty legal question that was only recently addressed by the 8th Circuit. Impressively, Gabriel reasoned through the statutory language to arrive at a similar argument to that adopted by the 8th Circuit, namely that selective participation in a rights offering is acceptable because the distribution of equity in the rights offering is not "on account of" the creditors' claims, but on account of their new contribution in the rights offering.

Gabriel not only recognized an important lurking legal issue that was not discussed in class, but he was also able to engage in a sophisticated textual analysis to resolve the issue. I expect he'll have further opportunity to engage in such excellent legal thinking this summer as a summer associate at Kirkland & Ellis, LLP, which boasts perhaps the country's leading bankruptcy practice.

In addition to Gabriel's exam, I have separately reviewed a trio of writing samples. One is a memorandum regarding whether Bankruptcy Rule 3002.1 permits for punitive damages. The second is an excellent (and very interesting) paper he wrote for a seminar on the Warren Court regarding Mexican-American attorney Gus Garcia and the litigation of Hernandez v. Texas, 347 U.S. 475, 482 (1954), a forerunner case to Brown v. Board of Education, that held that the 14th Amendment prohibited states from excluding Latins from jury service. The third is a personal statement he provided me to give some additional background on himself for this letter. It's abundantly evident from these writing samples that Gabriel is a very strong writer, capable of lucid, organized, and stylish prose. He will be readily able to provide clear bench memos and draft opinions. His work product will need little, if any, revision.

A chambers is a close working environment, which makes personality fits critical. I've had occasion to see how Gabriel works as part of a team. The financial restructuring class included three team-based research assignments that required students to work together in digging through bankruptcy court dockets to find documents and answer questions. Gabriel's team worked well together, suggesting that he will be a good team player.

Gabriel is also a student I've particularly enjoyed talking to, in part because we share an interest in classical music. Gabriel majored in music in college and is an accomplished violinist. He's particularly proud of a performance he did of the Beethoven's entire "Archduke" piano trio, a formidable 40 minute work, under the tutelage of a Beethoven scholar.

Finally, a personal note about Gabriel's background and motivations. While Gabriel has attended elite eastern educational institutions, he is the child of Latin American immigrants from Nicaragua and Ecuador who fled to the United States because political instability in their countries foreclosed educational opportunities. Gabriel is keenly aware of the extreme paucity of Latins in the legal profession, and even more so at large law firms, and he hopes that he can serve as a role model for Latins hoping to join the legal community.

All of this is to say that I would hire Gabriel without hesitation. He will make a fantastic law clerk.

Sincerely,

Adam J. Levitin

Adam Levitin - ajl53@georgetown.edu - 202.662.9234

Memoranda on Municipal and Individual Liability Under Common and Federal Law in the District of Columbia

Question Presented

Can the District of Columbia, state agencies (specifically the Department of Youth Rehabilitation Services (DYRS)), and Mayor Bowser acting in her official capacity be properly named defendants in a complaint under common and federal law?

Brief Answer

Under common law, the District of Columbia can be a properly named defendant and liable for the actions of its officers under a *respondeat superior* theory. Additionally, under common law, Mayor Bowser may be named as a defendant because of *respondeat superior* liability, but she must have personally directed or countenanced the common law tort.

Under both common and federal law, agencies within the District of Columbia government are *non sui generis*, or not properly before the court as named defendants unless there is specific statutory authorization to the contrary. DYRS does not have statutory authorization, and thus is *non sui generis*. An agency that is *non sui generis* can only be held liable through a suit against the District of Columbia itself.

It's unlikely the clinic can name the District of Columbia or Mayor Bowser as defendants in a 42 U.S.C. § 1983 claim under a *Monell* liability theory given the facts currently in its possession. A *Monell* claim, as opposed to *respondeat superior*, is the mechanism to attach liability to the District of Columbia and its public officials in their official capacity for a 42 U.S.C. § 1983 claim.

I. Common Law Claims

A. District of Columbia

Under common law a plaintiff can properly name the District of Columbia as an individual defendant, liable for the actions of its officers, using a *respondeat superior* theory. Traditionally, employers are responsible for the actions of their agents when such agents are acting in furtherance of their duties to the employer. In *District of Columbia v. White*, 442 A.2d 159, 169 n.7 (D.C. 1982), the court stated, "[u]nder the doctrine of respondeat superior the District of Columbia is liable for the torts of its police officers acting under the scope of their employment." Additionally, the court in *Dingle v. District of Columbia*, 571 F. Supp. 2d 87, 99 (D.D.C. 2008), citing *White*, allowed a plaintiff to pursue "claims of common-law false arrest and assault and battery," against the District of Columbia.

For an officer's actions to be considered "within the scope of employment," the tortious acts "'must be actuated, at least in part, by a purpose to further the master's business,' and this 'intent or purpose excludes from the scope of employment all actions committed solely for the servant's own purposes.'" *Blair v. District of Columbia*, 190 A.3d 212, 226 (App. D.C. 2018) (quoting *District of Columbia v. Bamidele*, 103 A.3d 516, 525 (D.C. 2014)). So long as an officer is within the scope of their employment, the District of Columbia can be a properly named defendant, liable for the torts of its officers.

B. Public Officials

Respondeat superior-based liability is also applicable for public officials such as Mayor Bowser; however, the theory attaches differently for individual officials as opposed to the District of Columbia. For a public official, sued in his or her official capacity, to be liable "for the acts of their subordinates," he or she must have personally "directed or countenanced the tortious acts." *Turner v. District of Columbia*, 532 A.2d 662, 675 (App. D.C. 1987). Without a personal involvement in the matter, individual officials are not properly named defendants.

II. District of Columbia Agency Liability Under Common and Federal Law

Under both federal and common law, District of Columbia agencies cannot be named as individual defendants because they are *non sui generis*, unless a statute specifies otherwise. If a District of Columbia agency is *non sui generis*, it is not a class by itself, and is liable only through the District of Columbia. DYRS is not subject to any statutory exception and is thus *non sui generis*.

The federal district court has held that "in the absence of explicit statutory authorization, bodies within the District of Columbia government are not suable as separate entities." *Daskalea v. Washington Humane Soc'y*, 480 F.Supp.2d 16, 22 (D.D.C. 2007). More recently, the district court re-iterated this position in *Payne v. Dep't of Youth Rehab. Servs.*, No. 18-562, 2019 U.S. Dist. LEXIS 27511, at *5-6. ("District of Columbia government agencies may not sue or be sued unless specifically permitted by statute.").

The common law echoes the district court's holdings, finding that "bodies within the District of Columbia government," without any statutory authorization, are not "suable as a separate entity." *Braxton v. Nat'l Capital Housing Auth.*, 396 A.2d 215, 216-17 (App. D.C. 1978).

DYRS, specifically, is treated as a *non sui generis* "[body] within the District of Columbia government." *See Wilson-Greene v. Dep't of Youth Rehab. Servs.*, No. 06cv2262, 2007 U.S. Dist. LEXIS 49073, at *5-6. No statutes provide the explicit authorization that cases like *Wilson-Greene* require, meaning DYRS is not a properly named defendant. However, DYRS may be sued through the District of Columbia itself. *See Payne v. Dep't of Youth Rehab. Servs.*, No. 18-562, 2019 U.S. Dist. LEXIS 27511, at *5-6 (in rejecting DYRS as a named defendant, the court substituted the District of Columbia as a proper defendant).

III. 42 U.S.C. § 1983 Claims

A. Background: Municipal Liability & "*Monell* Claims"

In 1978, the Supreme Court held municipalities did not have absolute immunity from 42 U.S.C. § 1983 and could be sued for the unconstitutional actions of their agents in limited circumstances. *See Monell v. Dep't of Soc. Servs.* 436 U.S. 658 (1978). These claims are referred to as "*Monell*" or municipal liability claims. Subsequent District of Columbia federal case law has applied *Monell* and held that the District of Columbia is open to 42 U.S.C. § 1983 liability for the actions of its agents only if those agents "acted pursuant to municipal policy or custom." *Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004).

B. D.C.'s Municipal Liability under a 42 U.S.C. §1983 Claim

42 U.S.C. § 1983 provides a cause of action against any "person," who, "under color of any statute, ordinance, regulation, custom or usage, of any State, Territory, or District of Columbia

law," deprives another individual of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1996). "A municipality, such as the District, is a 'person' for § 1983 purposes." *Bell v. District of Columbia*, 82 F. Supp. 3d 151, 155 (D.D.C. 2015). Additionally, "under color of" encompasses abuse of state law, not only abuse while acting in accordance with the law. *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

While the District of Columbia qualifies as a person, *respondeat superior* is not the basis for municipal liability in 42 U.S.C. § 1983 claims. *See Monk v. D.C.*, No. 15-1574, 2016 U.S. Dist. LEXIS 153538, at *5-6. In line with *Monell*, municipalities are liable "for their agents' constitutional torts only if the agents acted pursuant to municipality policy or custom." *Id*. *Respondeat superior* cannot serve as grounds for §1983 municipal liability.

Instead of *respondeat superior*, a plaintiff bringing a municipal liability claim under 42 U.S.C. § 1983 must make out a two-step claim. First, the plaintiff must allege "a violation of his rights under the Constitution or federal law." *Collins v. City of Harker Heights*, 503 U.S. 115, 123-24 (1992). Second, the plaintiff must also allege "that the municipality's custom or policy caused the [rights] violation." *Id.* Thus, courts must "determine whether the complaint states a claim for a predicate constitutional violation," and "if so, then the court must determine whether the complaint states a claim that a custom or policy of the municipality caused the violation." *Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003).

The first prong of this test aims only to establish that the plaintiff suffered "some constitutional harm." *Id.* at 1306. The second prong goes towards the municipality's knowledge of the constitutional harm, and can be satisfied in one of three ways:

1. "the municipality or one of its policymakers explicitly adopted the policy that was 'the moving force of the constitutional violation,'"
2. a policymaker "knowingly ignore[d] a practice that was consistent enough to constitute custom," or
3. the municipality failed to respond "'to a need . . . in such a manner as to show "deliberate indifference" to the risk that not addressing the need will result in constitutional violations.'"

Warren v. District of Columbia, 353 F.3d 36, 39 (D.C. Cir. 2004) (quoting *Canton v. Harris*, 489 U.S. 378, 390 (1989), *Daskalea v. District of Columbia*, 227 F.3d 433, 441 (D.C. Cir. 2000)).

If any of these three methods are satisfied, and the plaintiff has established a constitutional harm, then he or she may bring a 42 U.S.C. § 1983 claim against the District of Columbia.

Here, without more facts, it seems unlikely the clinic can satisfy this test. It appears that the officers in question acted against the established policy of the police department and the municipality by failing to follow the explicit directions of the issued custody order. However, this is subject to change as the clinic gets more information. For example, records from DYRS could show that the agency routinely failed to follow its own procedures for issuing custody orders, and the District of Columbia was aware of this practice.

C. Mayor Bowser

Additionally, Mayor Bowser in her individual capacity may be a properly named defendant under the *Monell* doctrine only if she herself can be liable under a *Monell* claim. *See Miller v. Barry*, 545 F. Supp. 105, 107 (D.D.C. 1982) ("Also before the Court is the motion of defendants D.C. Mayor Barry and the District of Columbia . . . Those defendants contend that plaintiff may not recover against them under § 1983 . . . on a theory of *respondeat superior*. . . It is well settled that a plaintiff may not recover against a local government or municipality under § 1983 on

a *respondeat superior* theory . . . Thus plaintiff may not proceed against these defendants under §1983.").

Finally, it is important to note if the clinic can name the District of Columbia as a defendant, a court will likely dismiss claims against Mayor Bowser in her official capacity. Because "it is duplicative to name both a government entity and the entity's employees in their official capacity, courts routinely dismiss claims against the officials . . . when the entity itself is also sued." *Harris v. Bowser*, 404 F. Supp. 3d 190, 195-96 (D.D.C. 2019) (quoting *Trimble v. District of Columbia*, 779 F. Supp. 2d 54, 57 n.3 (D.D.C. 2011)).

Background: This is an argument section from a brief before the Board of Immigration Appeals (the Board) on remand from the Second Circuit. The Second Circuit consolidated our client's direct appeal and motion to reopen concerning his claim for Convention Against Torture (CAT) protection, which was stymied in part by ineffective assistance of counsel. This section argues that Mr. X possess a strong CAT claim that the Board on remand should grant outright. Given the sensitive nature of the case, all relevant names are redacted. The Georgetown Civil Litigation Clinic's client is Mr. X, the country of deportation is 'Foreign Country,' and the name of the gang involved is 'Gang B.'

1. MR. X HAS A VIABLE CAT CLAIM BECAUSE HE CAN DEMONSTRATE LIKELIHOOD AND ACQUISCENCE.

Mr. X possesses a strong CAT claim because he faces a high likelihood of harm in the Foreign Country and the Foreign Country government acquiesces to the commitment of ninety percent of drug-related crimes within its borders. To claim CAT protection, the non-citizen must demonstrate both a likelihood of harm in the country of deportation and government acquiesce to the likely harm. While cooperating with federal prosecutors, Mr. X's status as an informant became known, and soon after he began receiving threats from Gang B, a violent transnational gang with strong ties to the Foreign Country. Further, in the Foreign Country, Gang B regularly relies on government actors to aid in its crimes. The Board should grant Mr. X's CAT claim outright.

(a) *Gang B Ascertained Mr. X's Identity as an Informant and Gang B's Subsequent Harassment Demonstrates a Likelihood of Torture in the Foreign Country.*

Mr. X's cooperation with federal prosecutors resulted in the conviction of a known member of Gang B, a murderous gang with a presence in both the United States and the Foreign Country.

During the cooperation process, Mr. X's identity was revealed and shared with the gang. Because of this, Mr. X and his family received constant threats from Gang B and Mr. X's brother was forced to flee the family home in the Foreign Country. These facts demonstrate a high likelihood of torture should Mr. X be deported to the Foreign Country. This Board reviews these questions of fact under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i). Additionally, this Board must "accept as true" any facts introduced on a motion to reopen absent a showing they are "inherently unbelievable." *Najmabadi v. Holder*, 597 F.3d 983, 990 (9th Cir. 2010).

To qualify for CAT relief, noncitizens must demonstrate that they are "more likely than not" to "be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2). Torture includes acts "by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him . . . for an act . . . he has committed." 8 C.F.R. § 208.18(a)(1). In determining likelihood, the noncitizen must demonstrate "greater than a fifty percent chance . . . that he will be tortured upon return to his or her country of origin." *Mu-Xiang Wang v. Ashcroft*, 320 F.3d 130, 144 n.20 (2d Cir. 2003). Additionally, an agency must "consider *all* evidence . . . regardless of the weight it accords the alien's testimony." *Ramsameachire v. Ashcroft*, 357 F.3d 169, 184 (2d Cir. 2004). Harm or harassment against family members living in the country of deportation strengthens a likelihood showing. *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999).

Harm to Mr. X is likely. In evidence introduced on his motion to reopen, Mr. X declared that soon after his identity was revealed, he began to receive threats from and was eventually beaten by people with ties to Gang B. Mr. X was violently assaulted with a gun outside of a New York nightclub, leading to extensive injuries, hospitalization, and a government-suggested pause on his cooperation activities. 17.1 MTR CAR at 62. During this attack, Mr. X could identify a

friend of G's wife (G being a member of Gang B) in the crowd, and various members of the crowd told Mr. X they had a piece of paper with "proof that [G] got more time in prison because of [X's] cooperation." *Id.*

By cooperating against a known member of Gang B, Mr. X suffered a brutal attack in New York and faces an equally great risk of harm in the Foreign Country. Mr. X, again in his declaration, stated that men "connected with [G] . . . in the [Foreign Country]," are waiting for Mr. X to return "so that they can do something better than in the U.S." 17.1 MTR CAR at 64. Additionally, Mr. X's sister Y stated in her supplementary declaration that Mr. X's older brother Z was forced into hiding, fleeing the family home in the Foreign Country, because Gang B's members knew "they [could] get information about [Mr. X] through Z." 21-6655 CAR at 69-70. Y herself has received threatening phone calls from Gang B stating its members were "watching" her and trying to find out if Mr. X had gone to his mother's home in the Foreign Country, the house Z had to flee from. *Id.* at 69-70. These threats to Mr. X's family, per *Melgar de Torres*, strengthen the likelihood of harm Mr. X faces if deported to the Foreign Country.

Mr. X and his sister Y's testimonies, which were introduced on the motion to reopen and must be taken as true, critically demonstrate that Mr. X's likelihood of torture was increased both in the United States and in the Foreign Country. Mr. X has already been beaten in the United States by people with ties to Gang B and that risk of harm is just as great in the Foreign Country given the harassment of his brother and sister there. Mr. X fears he will likely be murdered – the paradigmatic harm that CAT was intended to guard against, if he is deported to the Foreign Country.

(b) *Gang B Routinely Operates in the Foreign Country with the Aid and Collaboration of the Government, Demonstrating Government Acquiescence.*

The high likelihood of torture Mr. X faces is facilitated by the Foreign Country government, which routinely aids gang violence. Despite some efforts by the police to enact reform, the applicable case law requires more to show that the government has not acquiesced.

To establish acquiescence, a noncitizen bears the burden to show the torture was "instigated . . . or with the consent or acquiesce of a public official or other person acting in their official capacity." *Mu Xiang Lin v. United States*, 432 F.3d 156, 159 (2d Cir. 2005). Government acquiescence "requires only that "government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it." *Khouzam v. Ashcroft*, 361 F.3d 161, 170 (2d Cir. 2004). Finally, even if some individuals "take action to prevent torture" within a government that "on the whole, is incapable of actually preventing [the] torture," it would not be "inconsistent" to find "government acquiescence" in that scenario. *Goulding v. Garland,* 851 Fed. Appx. 229, 231 (2d Cir. 2021) (quoting *De La Rosa v. Holder*, 598 F.3d 103, 110 (2d Cir. 2010)).

Gang B routinely works with and relies on the Foreign Country's government officials to conduct its operations. G is a member of Gang B. Mr. X in his declaration stated that G told Mr. X he regularly sends payments to family members in the Foreign Country government not out of any familial obligation, but solely to "aid [his] own criminal operations." 17.1 MTR CAR at 63. This is in keeping with reports establishing that over ninety percent of all drug-related offenses in the Foreign Country are committed with the aid of government officials exactly like the ones G regularly provides payments to. 21-6655 CAR at 298.

Again in Mr. X's declaration, he asserted that members of Gang B want to wait until he is back in the Foreign Country to "do something better than in the United States." 17.1 CAR at 64. In other words, Gang B are choosing to harm Mr. X in the Foreign Country with the government's acquiescence, as opposed to in the United States. This statement shows not only that the individuals

threatening Mr. X have the capability to harm him in the Foreign Country but also would *prefer* to harm him there because of the aid they receive from police.

Additionally, even though the Foreign Country government took action to fire some corrupt police officers, this does not sufficiently rebut a claim of acquiescence. 20-363 CAT at 80. In *De La Rosa v. Holder*, on a remarkably similar set of facts, the Second Circuit held that a Dominican Republic citizen who had collaborated with federal prosecutors in the United States possessed a viable CAT claim, even though the Dominican government had taken steps to curtail violence and cut back on corruption. *De La Rosa v. Holder*, 598 F.3d 103 (2d Cir. 2010).

In *De La Rosa*, the Second Circuit held "[w]here a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing torture, the fact that some officials take action to prevent the torture," is "neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* at 110. Despite some government efforts to reduce crime through the termination of officers, Gang B operates with an impunity that allows ninety percent of drug related crimes to be committed with the aid of the government. When the commission of drug related crimes is so synonymous with government assistance, the government must be deemed as acquiescing.

Mr. X's declaration and the supplementary reports on government acquiescence introduced in his motion to reopen, which must be taken as true, demonstrate that Mr. X faces a high likelihood of harm both in the United States and the Foreign Country, and that Gang B operates with near impunity due to the Foreign Country government's acquiescence. Mr. X has satisfied both elements of his CAT claim and this Board should grant relief outright.

Applicant Details

First Name	**Daniel**
Last Name	**Zonas**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**2392502578**

Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Oklahoma College of Law** **http://law.ou.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Oil and Gas, Natural Resources, and Energy Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

6/28/2023

Judge Browning:

I am writing to apply for a 2024-2025 clerkship with your chambers. I moved from Naples, Florida to Norman, Oklahoma to start my legal career in 2021, and I am now a 3L at the University of Oklahoma College of Law.

I like researching and writing about novel legal issues. As far as I can tell, clerking for you would be the best opportunity in the world because a federal docket contains almost every type of case there is.

I would do great work as a federal clerk. I am an Articles Editor for the Oklahoma Oil and Gas, Natural Resources, and Energy Journal, so I will be editing and proofreading my peers' work during the 2023–2024 schoolyear. During my internships, I have drafted countless pleadings and other papers, including a brief that was argued at the Oklahoma Supreme Court. I've researched and written memoranda on all sorts of topics, everything from defenses for criminal charges to the viability of a nuisance claim arising from dog barking. My supervising attorneys rely on my work because I make sure it's correct and clearly written. Nevertheless, when I write, I like to focus not just on accuracy and clarity, but also conciseness. Every sentence is more words that the reader needs to slog through, so I keep wordiness to a minimum.

I am confident that my educational and professional experience will make me an asset. Please let me know if we can schedule an interview. I want this clerkship, and I will work hard for you if I get it.

Respectfully,
Daniel Zonas

Daniel Zonas

(239) 250-2578 - danielzonas@yahoo.com

Education

University of Oklahoma College of Law 2021–2024

- GPA: 9.339/12.0 (equivalent to 3.4/4.0)
- Rank: 59 of 201
- Articles Editor for the Oil and Gas, Natural Resources, and Energy Journal
- Dean's Honor Roll Fall 2021 and Spring 2023
- Amicus Society Public Interest Fellow, over 250 pro-bono hours

Florida State University 2017–2021

- B.A. in Philosophy

Professional Experience

Jason Waddell, PLLC Summer 2023
Law Clerk *Oklahoma*

- Drafted a brief in support of an application for writs of prohibition & mandamus regarding an order enforcing overbroad subpoenas duces tecum.
- Drafted countless pleadings, including a motion for summary judgment for a breach of contract claim, a motion to strike regarding improper summary judgment affidavits, and a response to a motion to dismiss in a dog bite case.
- Attended many depositions and hearings.

Mazaheri Law Firm Spring 2023, Summer 2023
Law Clerk *Oklahoma*

- Drafted a response to a position statement for a Title VII retaliation claim.
- Drafted many research memoranda, including the legality of a tipping policy, defenses for a reckless conduct charge, and venue for a property dispute.
- Drafted several divorce decrees and an antenuptial agreement.
- Drafted many demand letters, EEOC charges, and discovery requests.
- Met with clients.

Oklahoma County District Attorney's Office Summer 2022
Law Clerk *Oklahoma*

- Worked in the Oklahoma County Diversions Team.
- Managed restitution for Diversion Court participants by consulting victims.
- Attended various trials, hearings, and arraignments.
- Drafted a motion to dismiss for the Felonies Team.

Schwartz & Zonas Summer 2018, Summer 2019
Receptionist *Florida*

- Handled client intake for personal injury and criminal defense attorneys.

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Grade Points

A+	12
A	11
A-	10
B+	9
B	8
B-	7
C+	6
C	5
C-	4
D+	3
D	2
D-	1
F	0

THE UNIVERSITY OF OKLAHOMA COLLEGE OF LAW UNOFFICIAL TRANSCRIPT

Zonas, Daniel Patrick
716 W Saint Augustine St
Tallahassee, FL 32304-4330

Course	Dept	No.	Hours	Grade
Fall 2021				
Legal Foundations	LAW	6100	1	S
Property	LAW	5234	4	B+
Torts	LAW	5144	4	A-
Research/Writing & Analysis I	LAW	5123	3	B+
Civil Procedure I	LAW	5103	3	B+
GPH: 14	GPS: 130	HA: 15	HE: 15	GPA: 9.286
Spring 2022				
Criminal Law	LAW	5223	3	B+
Civil Procedure II	LAW	5203	3	A-
Intro to Brief Writing	LAW	5201	1	B+
Constitutional Law	LAW	5134	4	B
Oral Advocacy	LAW	5301	1	B
Contracts	LAW	5114	4	B
GPH: 16	GPS: 138	HA: 16	HE: 16	GPA: 8.625
Summer 2022				
Extern Placement	LAW	6400	3	S
Issues in Professionalism	LAW	6400	2	S
GPH: 0	GPS: 0	HA: 5	HE: 5	GPA: 0.000
Fall 2022				
Evidence	LAW	5314	4	A
Trademarks	LAW	6223	3	A-
Oil and Gas	LAW	6540	3	B
Professional Responsibility	LAW	5323	3	B+
ONE J	LAW	6331	1	S
GPH: 13	GPS: 125	HA: 14	HE: 14	GPA: 9.615
Spring 2023				
Family Law	LAW	5443	3	B+
Secured Transactions	LAW	5750	3	A-
Torts II	LAW	6100	2	B+
Oil and Gas Contracts and Tax	LAW	6550	3	A
Tort Law/Communications Media	LAW	6700	2	A
GPH: 13	GPS: 130	HA: 13	HE: 13	GPA: 10.000
Fall 2023				
Crim Pro: Investigation	LAW	5303	3	

Income Taxation of Individuals	LAW	5463	3	
Civil Pretrial Litigation	LAW	5530	3	
Unincorporated Entitities	LAW	5733	3	
Workers' Compensation	LAW	6100	2	
Trial Techniques	LAW	6410	3	
GPH:	GPS:	HA:	HE:	GPA:

	GPH	**GPS**	**HA**	**HE**	**GPA**
OU CUM:	56	523	63	63	9.339

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The University of Oklahoma

COLLEGE OF LAW

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June 11, 2023

Dear Judge:

I am writing this letter on behalf of Daniel Zonas a law student who has applied for a federal clerkship. I had the pleasure of having Daniel as a 1L in Research/Writing & Analysis I, Intro to Brief Writing, and Oral Advocacy classes. Daniel is a diligent and capable student who has consistently shown strong skills in legal research, writing, and analysis. He has a solid understanding of complex legal concepts and has the ability to articulate them effectively in writing. In my legal writing class, Daniel produced well-reasoned legal documents, displaying his knowledge of the law and its practical application.

Apart from his academic achievements, Daniel is motivated to keep learning about the practice of law outside of classes. His resume notes that he has drafted many court documents for practicing attorneys since his 1L year. While I haven't had an opportunity to interact with Daniel since having him in class, I'm happy to see he has continued honing his legal writing and critical thinking skills.

Based on Daniel's academic performance, writing ability, and work ethic, I believe he would be a suitable candidate for a federal clerkship. I have confidence that he possesses the necessary qualities and abilities to fulfill the responsibilities of this role. He will make valuable contributions to any court he has the opportunity to join.

If I may be of further assistance, please do not hesitate to telephone or write me.

Sincerely,

Daniel Nicholson
Associate Professor of Legal Practice
OU College of Law

Prof. Nicholson | Word Count: 2491 | Daniel Zonas § 3B
Nov. 23, 2021
Memo 2

MEMORANDUM

To: Mary Johnson
From: Daniel Zonas
Re: Our client, Melissa Moreno; Exculpatory Agreement
Date: Nov. 23, 2021

QUESTION PRESENTED

Will the exculpatory agreement signed by Melissa Moreno on behalf of her daughter, Meghan Moreno, bar an ordinary negligence claim against Wild Animal Safari LLC (Safari) under Oklahoma law?

BRIEF ANSWER

Most likely no. Exculpatory contracts require clear and unambiguous language containing the nature and extent of possible damages in order to be valid. Safari's exculpatory contract likely fails in describing the nature of possible damages, as the activity it is supposed to be concerning is unclear. Additionally, an exculpatory agreement must not violate public policy. An exculpatory agreement signed on behalf of a minor waiving her right to sue before she is injured most likely would violate public policy in Oklahoma and be unenforceable.

STATEMENT OF FACTS

Melissa Moreno, our client, and her daughter Meghan signed an exculpatory agreement to allow Meghan, a minor, to participate in a group photo shoot at the Safari location. The agreement contained headings titled, "Waiver of Liability," "Assumption of Risk," "Liability for Associated Costs," and "Waiver of Legal Action." The contract's wording attempted to protect Safari from liability for "the Activity,"

defined as "participation in and spectatorship of events and activities relating to wild animals." Among the company's events listed on its website, there is "Tiger Feeding," which involves "feeding [tigers] chicken drumsticks attached to a pole." This group shoot was a long-standing tradition that involved taking photos of the team standing 10 feet behind a chain-leashed tiger named George. Afterwards, Johnny Strayhorn, the company owner, offered team members an unplanned opportunity to pet George while he licked their hand for a single-person photo shoot, which Meghan participated in. George attacked Meghan during this, causing her significant injury and permanent disfigurement.

DISCUSSION

THE EXCULPATORY AGREEMENT SIGNED BY MORENO ON BEHALF OF HER DAUGHTER WILL MOST LIKELY NOT BAR AN ORDINARY NEGLIGENCE CLAIM AGAINST SAFARI UNDER OKLAHOMA LAW.

Established Oklahoma common law provides that exculpatory agreements, including release forms, are "generally enforceable," but "distasteful to the law." *Schmidt v. U.S.*, 1996 OK 29, ¶ 8, 912 P.2d 871. As such, for an exculpatory agreement to be valid, (1) its "language must evidence a clear and unambiguous intent to exonerate the would-be defendant from liability for the sought-to-be-recovered damages;" (2) "at the time the contract (containing the clause) was executed there must have been no vast difference in bargaining power between the parties;" and (3) "enforcement of these clauses must never (a) be injurious to public health, public morals or confidence in administration of the law or (b) so undermine the security of individual rights vis-à-vis personal safety or private property as to

violate public policy." *Id.* (footnote omitted). Element (1) requires that the contract "describe[s] the nature and extent of damages from which that party seeks to be relieved." *Id.* Additionally, element (2) considers "the importance of the subject matter to the physical or economic well-being of the [agreeing party]" along with its "free choice . . . when seeking reasonable alternatives." *Id.*

There is no evidence to suggest that having a team photo shoot with a tiger was necessary or important to Meghan's wellbeing. In choosing to sign the contract, Melissa and Meghan's decisions were not slanted by any meaningful physical or economic incentive or detriment. As such, element (2) of *Schmidt* is satisfied. Element (1) is questionable because it is unlikely that Moreno had the particular nature of Meghan's injuries in mind when the contract was signed. Additionally, element (3) will most likely remain unsatisfied because it will undermine individual rights by allowing Melissa to release liability on behalf of Meghan.

A. Safari's exculpatory agreement likely did not provide a clear and unambiguous intent to exonerate itself from liability for the sought-to-be-recovered damages.

In order for the exculpatory agreement in question to be valid, it must provide a "clear and unambiguous intent to exonerate the would-be defendant from liability for the sought-to-be-recovered damages . . . ." *Id.* (footnote omitted). This includes a "clear and cogent . . . [description of] the nature and extent of damages from which that party seeks to be relieved." *Id.* ¶ 10. Importantly, "the nature of the wrongful act—for which liability is sought to be imposed—must have been foreseen by, and fall fairly within the contemplation of, the parties." *Id.* (emphasis omitted).

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The court looks at specific text within an exculpatory contract to determine whether it passes the first *Schmidt* element. *Manning v. Brannon*, 1998 OK CIV APP 17, ¶ 7, 956 P.2d 156, 158 (approved for publication by the Oklahoma Supreme Court). In *Manning*, an exculpatory agreement regarding skydiving passed this test. *Id.* ¶ 15.

This agreement contained headings including "RELEASE FROM LIABILITY, COVENANT NOT TO SUE, INDEMNIFICATION AND HOLD HARMLESS, and LIMITATION OF WARRANTY," which were determined to contain sufficient language to prove intent to release the party from liability. *Id.* In addition to this, the nature and extent of possible damages were shown in "ASSUMPTION OF THE RISK." *Id.* ¶ 11. This heading described the extent of damages properly when it included "RISK OF DEATH OR OTHER PERSONAL INJURY." *Id.* The same section also properly described the nature of possible damages when it mentioned "parachuting activities" and included possible causes of harm, such as "equipment malfunction, . . . inadequate training, and deficiencies in the landing area." *Id.*

Safari's exculpatory agreement language indicates that Safari intends to release itself from liability. The terms of this agreement have very similar language to the terms of the agreement in *Manning*. Both agreements share a release of liability, a waiver of legal action, and a liability agreement for associated costs. These sections of Moreno's exculpatory contract are "Waiver of Liability," "Waiver of Legal Action," and "Liability for Associated Costs." Although phrased differently, they serve the same purposes as the terms of the *Manning* agreement. The only

section mentioned whose purpose is not shared by both agreements is the "LIMITATION OF WARRANTY" in the *Manning* contract, which is not relevant to contracts that don't involve equipment.

Safari's exculpatory agreement describes its activities as carrying a "possibility of personal injury, disfigurement, death, . . . and/or loss resulting therefrom." This follows the description of the extent of damages in *Manning* closely and is more than sufficient, considering the actual damages Meghan suffered were personal injury and disfigurement.

However, its description of the nature of damages is likely insufficient. The contract mentions nothing beyond "the participation in and spectatorship of events and activities relating to wild animals." The most lenient possible interpretation of this description is that it covers whatever activity Safari is hosting that the releaser is agreeing to take part in. At the time of the signing of the contract, this activity would have been presumed through long-standing tradition to be taking group photos 10 feet behind a chained, adult tiger. But Johnny offered Meghan the opportunity to get close enough to touch George while taking an individual photo, where the accident took place. None of the activities on the Safari website involved getting this close to a dangerous animal like a tiger. In fact, even the tiger-feeding activity on the website involves feeding a tiger from a pole. While the *Manning* contract is significantly more satisfactory in describing the nature of possible damages, it is still not irreconcilable with Safari's contract. A court could still consider Safari's contract to allow the nature of the damages to "fall fairly within the contemplation" of both parties. With these considerations, it is reasonable to say

the nature of Meghan's damages was likely unforeseen by Moreno when she signed the contract and that Safari's exculpatory agreement violated element (1) of *Schmidt*.

B. Enforcement of Safari's exculpatory agreement would most likely be injurious to public health, morals, or confidence in administration of the law.

For this contract to be valid, it must not "be injurious to public health, public morals, or confidence in administration of the law . . . ." *Schmidt v. U.S.*, 1996 OK 29, ¶ 8, 912 P.2d 871. This element has to do with the enforceability of an exculpatory agreement in relation to the particular activity it concerns. *Combs v. West Siloam Speedway Corp.*, 2017 OK CIV APP 64, ¶ 17, 406 P.3d 1064.

Oklahoma courts generally do not hold an activity to be against public policy because of its risky, non-essential nature. *Manning*, 1998 OK CIV APP 17, ¶ 17, 956 P.2d at 159. In *Manning*, a contract involving release of liability for skydiving was determined to not violate public policy. *Id.* ¶ 17. Similarly, in *Combs*, an individual signed a valid exculpatory agreement that allowed him to spectate from the infield area of a car race. *Combs*, 2017 OK CIV APP 64, ¶ 17, 406 P.3d at 1069.

Moreno signed a contract allegedly allowing Meghan to participate in taking individual photos while a mature tiger is licking her. This activity is non-essential and recreational, like skydiving. As shown in *Combs* and *Manning*, the public is afforded autonomy in waiving rights to make dangerous recreational activities possible. An argument could be made that tiger photos are made unenforceable by

crossing the line of what is too dangerous and non-essential, but there is little to no definitive case law to support this claim.

Because of this, enforcement of this contract most likely would not injure public health, morals, or confidence in administration of the law.

C. Enforcement of Safari's exculpatory agreement would most likely violate public policy by undermining the security of individual rights.

This contract is not valid if it "undermine[s] the security of individual rights vis-à-vis personal safety . . . ." *Schmidt*, 1996 OK 29, ¶ 8. "The contract of a minor may be disaffirmed by the minor himself, either before his majority or within one (1) year's time afterwards . . . ." 15 O.S. § 19 (OSCN 1972). In Oklahoma, "[a]s a matter of public policy, courts have protected minors from improvident and imprudent contractual commitments by declaring the contract of a minor is voidable at the election of the minor after she attains majority." *Wethington v. Swainson*, 155 F.Supp.3d 1173, 1178 (W.D. Okla. 2015).

Oklahoma courts require court approval on post-injury agreements not to sue made on behalf of a minor. *Gomes v. Hameed*, 2008 OK 3, ¶ 1, 184 P.3d 479, 482. In *Gomes*, an oral exculpatory agreement not to sue was allegedly entered on behalf of a minor after she was severely injured from childbirth. *Id.* ¶ 30. The court ruled that an agreement like this one would require court approval before it could effectively waive any "substantial rights." *Id.* The rationale behind this decision was the idea that it is "the duty of the court to guard with jealous care the interests of minors in actions involving their rights." *Id.* ¶ 23. This type of required court

approval could be applied to pre-injury contracts. *Wethington*, 155 F.Supp.3d 1173. In *Wethington*, an exculpatory agreement was signed on behalf of a minor to waive her ability to sue in case of injury caused by the defendant's negligence, which led to a violation of *Schmidt*'s element (3)(b). *Id.* at 1179. Since the court lacked precedent, it had to predict whether *Gomes* would apply to a pre-injury contract. *Id.* at 1178. The court concluded that the Oklahoma Supreme Court would find that "an exculpatory agreement regarding future tortious conduct, signed by parents on behalf of their minor children, is unenforceable." *Id.* at 1179. Since the *Wethington* agreement involves future and not past tortious conduct, it was rendered outright unenforceable against the minor child, allowing her to sue once she attained majority. *Id.* Contrarily, a court might also hold such a contract to be enforceable. *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201 (Ohio 1998). In *Zivich*, a mother signed an exculpatory agreement barring prospective negligence claims on behalf of her minor child, who was then injured at a soccer game hosted by a nonprofit organization. *Id.* According to the court, "public policy supports [such an agreement]." *Id.* at 372. The contract being valid enabled the availability of "affordable recreation." *Id.* If the risk of litigation and substantial damage awards were to be carried by nonprofit organizations and associated volunteers, they "could very well decide that the risks are not worth the effort" and the number of activities made possible through their services would be reduced. *Id.*

If Moreno's case follows *Wethington*, Safari's exculpatory agreement will be rendered invalid under element (3)(b) of *Schmidt*. If so, Meghan will be able to disaffirm her agreement made as a minor and sue Safari once she attains majority. This potential outcome is supported by *Wethington* being almost strictly analogous to *Moreno*'s case. Both cases involve a pre-injury exculpatory contract regarding a dangerous, recreational activity. However, while it can predict how the Oklahoma Supreme Court might rule, it is not mandatory precedent. So, Moreno's question is not immediately resolved from *Wethington*. Still, even though *Wethington* is not mandatory, *Gomes* is. Therefore, the driving rationale in *Wethington* of courts having a duty to "guard . . . the interests of minors in actions involving their rights" is a duty that exists, and will drive the outcome of Moreno's case. An Oklahoma court could possibly affirm the exculpatory clause like the court in *Zivich*. However, the contract in *Zivich* aims to exculpate a nonprofit organization hosting events beneficial to the public, a fact that is used as a significant portion of the rationale in its decision. Safari is not a nonprofit, and its community does not have a similar reason to promote its activities because activities involving wild animals are not as important as affordable youth sports. So, a court would most likely prefer the reasoning in *Wethington* over the reasoning in *Zivich*. Thus, enforcement of Safari's exculpatory agreement would most likely violate public policy by undermining the security of individual rights.

CONCLUSION

The exculpatory agreement signed by Moreno will most likely not bar an

ordinary negligence claim against Safari. For a contract of this kind to be valid, it needs to have clear and unambiguous language, no vast difference in bargaining power, and no violation of public policy. Additionally, minors have the ability to rescind contracts they sign, rendering them invalid.

Safari's exculpatory agreement will likely violate the "clear and unambiguous language rule" because the tiger photo session where Meghan was injured was likely not foreseeable to Moreno when she signed the contract. Minors in Oklahoma have the right to rescind contracts they sign, meaning Meghan's agreement is inconsequential in determining whether she can sue. Using *Wethington* as a predictor, an Oklahoma court would most likely hold Melissa's agreement to be unenforceable and ineffective in waiving her daughter's right to sue. Therefore, Meghan will most likely have the ability to rescind the contract and sue on her own behalf, even if the contract is determined to be valid by *Schmidt*'s "clear and unambiguous" standards.

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Mar. 14, 2022
Appellate Brief

NO. 22-050

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM, 2022

JAMIE WHITTEN,

Petitioner,

v.

STATE OF GARNER,

Respondent.

On Writ of Certiorari to the
Garner Supreme Court

BRIEF FOR PETITIONER

Daniel Zonas
Attorney for Petitioner

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QUESTION PRESENTED

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." However, some states have passed legislation prohibiting video recording of police officers without all-party consent.

The state of Garner passed an anti-surreptitious recording law prohibiting the creation of any sort of recording containing any conversation without all-party consent or prior warning. After recording her own arrest during a rowdy protest and subsequent interactions with her arresting officers, Whitten was charged with violating the statute.

Did this application of the Garner statute violate Whitten's First Amendment rights?

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OPINIONS BELOW

The opinion of the District Court is unavailable. The opinion of the Supreme Court of Garner is available in the Record. (R. at 2–8.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the First Amendment of the United States Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This case also involves the interpretation and application of Garner Statute title 75, § 52, which prohibits recording any conversation "without the consent of all parties" or otherwise without warning. (R. at 8–9.)

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STATEMENT OF THE CASE

Jamie Whitten attended an animal rights protest at Wild Animal Safari, where there was a large crowd being subdued by law enforcement. (R. at 3–4.) The protest was an open demonstration that took place on private property open to the public. (R. at 6.) While police officers attempted to control the protestors, Whitten began recording the protest on her iPhone. (R. at 4.) She then placed her phone in her pocket while it continued to record. (R. at 4.)

Subsequently, Whitten was arrested on unrelated charges. (R. at 4.) She continued to record as she was being arrested. (R. at 4.) Whitten recorded her conversation with the police officers while in the patrol car. (R. at 4.) Her iPhone continued to record until just before she was placed in her holding cell, where it was confiscated and the recording was terminated by the police. (R. at 4.)

Whitten was charged with violation of Garner's Anti-Surreptitious Recording Privacy Law for filming her arrest and later conversation with the police in the patrol car. (R. at 5.)

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Supreme Court of Garner and remand this case for further proceedings. The Fourteenth Circuit is made an outlier among precedent from other circuits from this decision, and the Supreme Court of Garner caused an artificial circuit split to turn into a real circuit split. Other circuits have held that one has a First Amendment right to record police officers

performing their duties in public spaces, and Whitten's case falls within these boundaries.

The Garner statute limits recording rights, which infringes upon First Amendment rights. The statute prohibits the recording of conversations without consent. The recordings created through this activity are categorically different from any other sort of recordings. Since the statute's goal of privacy cannot be justified without reference to this type of content, the Garner statute is content-based and should be analyzed under strict scrutiny.

Even if this Court must apply intermediate scrutiny, the Garner statute is still unconstitutional as applied to Whitten. Under intermediate scrutiny, protecting police privacy as individuals undermines the right of the public to receive information about government activity. As such, the government interest in the Garner statute is not substantial and cannot be justified under intermediate scrutiny.

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ARGUMENT AND AUTHORITIES

THE GARNER ANTI-SURREPTITIOUS RECORDING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO JAMIE WHITTEN.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The right to freedom of speech listed in the First Amendment to the U.S. Constitution is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). The state of Garner's Anti-Surreptitious Recording Privacy Law is competing with the right to free speech in this case. (R. at 8.) The state of Garner passed this statute under its authority to protect a person's general right to privacy, a privilege granted to the states. *Katz v. United States*, 389 U.S. 347, 350–51 (1967). This regulation prohibits recording a conversation surreptitiously or otherwise without consent or prior warning. (R. at 8–9.) The regulation leaves an exception for verified journalists, who are granted authority to film interactions between police officers and citizens by being immune to the Garner statute. (R. at 9.)

The Garner statute burdens First Amendment rights, as the right to free speech encapsulates free sharing of information, which entails the right to create such information. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). Furthermore, the state of Garner's purpose in enacting this legislation is to regulate specific content, conduct that warrants analysis under strict constitutional scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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This Court should reverse the Garner Supreme Court's ruling and find the Garner statute unconstitutional as applied to Whitten. Applying the Garner statute to individuals recording police officers performing their duties on public property and private property open to the public violates fundamental rights of individuals granted under the First Amendment. These rights are substantial enough to render the Garner statute unjustifiable.

This case involves a constitutional inquiry and is therefore reviewed de novo. U.S. Const. art. III, § 3; *see also Marbury v. Madison*, 5 U.S. 137 (1803).

A. The Garner statute should be analyzed under strict scrutiny.

1. The Garner statute restricts First Amendment rights.

The First Amendment of the Constitution of the United States holds, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. This extends beyond the right to share information and includes the right to create such information, like an audiovisual recording. *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 595–96 (7th Cir. 2012). The right to free speech "would be insecure, or largely ineffective, if the antecedent act of *making* [a] recording is wholly unprotected . . . ." *Id*. Agreement is "practically universal" that a primary purpose of the First Amendment is to protect "free discussion of government affairs." *Id*. at 597. The government may not overstep the First Amendment protection of the free sharing of information by simply regulating the means by which such information is gathered. *Id*. Protecting a video under the

First Amendment but not the creation of that video "defies common sense." *Wadsen*, 878 F.3d at 1203.

The Garner statute prohibits audio and/or video recordings of conversations without all-party consent. Whitten was charged with violating this statute in relation to the recording she produced in the police car. Plainly, this statute prohibits the creation of certain audiovisual recordings, behavior that is protected by the First Amendment. So, the Garner statute restricted Whitten's First Amendment rights.

2. The Garner statute is a content-based restriction, and should be subject to strict scrutiny.

Statutes that burden constitutional rights are unconstitutional unless they are able to survive an applicable level of scrutiny. *Alvarez*, 679 F.3d at 601–02. Freedom of expression is "subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984). These restrictions are valid if they are content-neutral and meet an intermediate scrutiny standard. *Id*. Contrarily, content-based restrictions must meet the standard of strict scrutiny. *Alvarez*, 679 F.3d at 603. Content-neutrality depends on the purpose of the regulation in question. *Id*. "Regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). If a regulation's purpose is unrelated to the content of expression, it's content-neutral. *Ward*, 491 U.S. at 791. This holds true even if "it has an incidental effect on some

speakers or messages but not others." *Id*. Thus, "[t]he government's purpose is the controlling consideration." *Id*. A law is content-based if it was enacted "because of disagreement with the message [speech] conveys." *Id*. Importantly, a "facially content-neutral" law can be content-based if it "cannot be "'justified without reference to the content of the regulated speech . . . .'"" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015) (quoting *Ward*, 491 U.S. at 791).

The Garner statute distinguishes and prohibits some types of content. It disallows recordings made secretly, and allows recordings made with consent or a warning. Secret recordings are different in content from recordings made with consent. Individuals who know they are being recorded act differently than if they are being recorded secretly, entailing different recordings being made. Crucially, if both secret and permissive recordings were to share the same content, there would be no purpose served in banning one of them but not the other. So, the Garner statute necessarily categorically bans some types of content.

The fact that the Garner statute bans some types of content and not others does not entail that it's content-based. Instead, one must look to the government's purpose to determine whether the statute is content-based. The government's purpose in the Garner statute can be found in its name, "Anti-Surreptitious Recording Privacy Law." (R. at 8.) Clearly, the regulation was put in place for the sake of individual privacy. However, what is also present in the statute title is the means by which the state attempts to achieve this end, "Anti-Surreptitious

Recording." So, the goal of the statute is individual privacy, and the means is the prohibition of secret recordings.

A surreptitiously recorded video may have no definitive signs that it was recorded without consent. However, it remains unique content enabled by one's ability to record without consent. Such a recording would not exist without an ability to create it. Furthermore, once it does exist, the government cannot distinguish content that was secretly recorded from content that was recorded with consent even though they are separate types of content, one of which the government has an interest in prohibiting.

It's important to understand that the means are intimately tied to the ends of the Garner statute. The statute cannot be construed without regulating specific content. In fact, the only reason the statute is effective is because it regulates expression based on the substance of that expression's content. According to *Turner*, the purpose of intermediate scrutiny being applied to content-neutral regulations is because they don't pose as much risk in eliminating certain viewpoints. However, the Garner statute is wholly founded on which content the government deems appropriate.

Content that is obtained surreptitiously is not regulated because of the means through which it was obtained. Instead, it's regulated because of government disapproval of the content itself. The regulation of surreptitiously gathered content is not incidental, but the integral and primary goal of the statute. The goal of privacy in this statute's context cannot be justified without reference to its means,

which consists of content discrimination and regulation. As such, in congruence with the standard in *Reed*, the Garner statute is content-based and should be subject to strict scrutiny.

B. The Garner statute survives neither intermediate nor strict scrutiny as applied to Jamie Whitten and is therefore unconstitutional.

In order to survive strict scrutiny, a law must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Wadsen*, 878 F.3d at 1204. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a substantial government interest." *Ward*, 491 U.S. at 789. If a law fails an intermediate scrutiny test, it will also fail a strict scrutiny test. *Alvarez*, 679 F.3d at 604. However, if a law does not fail an intermediate scrutiny test, it may still fail a strict scrutiny test. *Id.*

Although strict scrutiny should apply to this case, the Petitioner recognizes the possibility that this Court may not accept its argument for strict scrutiny. Even if intermediate scrutiny should apply, however, the Garner statute does not survive and is unconstitutional as applied to Whitten. Strict scrutiny is a heightened form of intermediate scrutiny, maintaining the same elements and relationship between them. Therefore, the following argument will be tailored to the less constitutionally demanding standard of intermediate scrutiny, but remains unchanged in substance if strict scrutiny is determined to be the applicable standard.

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1. Individuals have a right to record police officers performing their duties in public spaces.

The driving force behind the right to record police officers performing their duties is the interest the public has in the "free discussion of government affairs." Gregory T. Frohman, Comment, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action*, 64 Case W. Res. L. Rev. 1897, 1908 (2014). There is a significant "role of police recordings in exposing police conduct to the public." *Id*. at 1903. This interest is substantial, and a muscle that is used to "distinguish a free nation from a police state." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). Distinctly, "a person's general right to privacy" is "left largely to the law of the individual states." *Katz*, 389 U.S. at 350–51.

Numerous circuits have recognized a right to record police officers performing their duties in public spaces. Gregory T. Frohman, *What Is and What Should Never Be: Examining the Artificial Circuit "Split" on Citizens Recording Official Police Action* 1897, 1940 (2014). In fact, on this question, there only exists an "artificial circuit split," where some courts affirm the right exists and others dodge the question by instead dealing with qualified immunity and whether the right is "clearly established." *Id*. This strategy stems from the decision in *Pearson v. Callahan*, where the Supreme Court vested discretion in district and circuit court judges to decide which prong of qualified immunity should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). These prongs are, (1) whether there is a violation of a constitutional right, and (2) whether that right was clearly

established at the time. *Id*. If a court chooses to tackle prong (2) and finds that a constitutional right is not clearly established, its analysis could end there. *Id*. In fact, because of this allowance, no courts have specifically denied the existence of the right to surreptitiously record police officers performing their duties. Frohman, *supra* at 1940.

In *Shevin v. Sunbeam Television Corp.*, a Florida wiretapping statue's constitutionality was challenged. *Shevin v. Sunbeam Television Corp*., 351 So. 2d 723, 725 (Fla. 1977). Sunbeam Television Corp., a news company, claimed that "secret recordings" prohibited by the statute had value to the public in that they assured accuracy of recordings made. *Id*. However, the court found the statute to be constitutional, holding that "hidden mechanical contrivances are not indispensable tools of news gathering." *Id*. at 727. Some cases have established an affirmative right to secretly record police officers performing their duties. *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017). In *Fields v. City of Philadelphia*, two individuals, one of which was arrested, brought suit against the city for retaliation against their recording of police officers performing duties on a public sidewalk and at a convention center, respectively. *Id*. at 356. *Fields* affirmed the individuals had a First Amendment right to carry this out, citing the importance of accessing "information regarding public police activity." *Id*. at 359. Furthermore, in *Glik*, an individual was arrested after videotaping police officers carrying out another individual's arrest in a park. *Glik*, 655 F.3d at 79. The court found through an unabridged qualified immunity analysis that this person had a First Amendment

right to film the arrest because it was a "matter of public interest" and was carried out in a public space. *Id.* at 84.

In addition to citing a "right to record matters of public interest," the court noted that "news-gathering protections of the First Amendment cannot turn on professional credentials or status." *Id.* at 83–84. The latter point was supported by the idea that one's right to access information is "coextensive" with that of the press, and a contemporary news story is "just as likely" to be produced by an individual as an actual reporter. *Id.* Additionally, in *Smith v. City of Cumming*, an individual was prevented from taking a video of police actions in violation of his First Amendment rights. *Smith v. City of Cumming*, 212 F.3d 1332, 1332 (11th Cir. 2000). The court determined that the individual did in fact have this right to film, and nothing that the "press generally has no right to information superior to that of the general public." *Id.* at 1333.

The court in *Shevin* did not err in its ruling, and presents no impediment to Whitten's case. *Shevin* is similar to the instant case in that it involves a wiretapping statute prohibiting a type of recording that is valuable to the public. However, the major difference is that the challenge to the Florida wiretapping statute makes no reference to recording police officers. This fact is what sets *Shevin* apart from Whitten's case and prevents it from contributing to the circuit split on this issue.

The case at hand is much more similar in nature to *Fields* and *Glik*, which involve the videotaping of police officers. A rationale frequently cited in these types

of cases includes informing the public of police activity and newsgathering for dissemination of government affairs. This rationale is not mentioned in *Shevin*. The available cases addressing whether one has a First Amendment right to record police officers while performing their public duties show a clear trend in the affirmative. The public has an undeniable right to monitor the proper fulfillment of police duties, which should be subject to only reasonable restrictions. This is the integral component of Whitten's case that sets her aside from other newsgatherers such as the one in *Shevin*.

One might argue that the Garner statute overcomes the need to afford the public this right to record by granting special privileges to "verified journalists." (R. at 9.) However, this does not stop the statute from violating essential public First Amendment rights. This Court should follow precedent from *Glik* and *Smith* on this issue. While such an exception allows a pathway for exposure of police conduct, *Glik* makes a relevant note that this right is shared by all of the public, and cannot be limited to just reporters. Contemporary technology standards don't make reporters obsolete, but they do influence the scope of people able to gather information. When that information is of particular First-Amendment-protected public interest, government limitation is unconstitutional. In a society with protected free speech, it is important to ensure every person has a right to access information, without qualifications and restrictions.

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The government's interest in individual privacy is not compelling enough to overcome the individual First Amendment right to record police officers performing their duties in public.

2. The right to record police officers performing their duties includes private property that acts as a public space in addition to public property.

The reasoning in *Glik* is limited to "public" spaces. *Glik*, 655 F.3d at 84. The recording in *Glik* took place in a public park. *Id.* at 79. However, in *Gericke v. Begin*, an individual was arrested for filming another individual's traffic stop. *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014). The court cited *Glik* in affirming the individual's right to film, saying that the activity was "carried out in public." *Id.* at 7. *Project Veritas Action Fund v. Rollins*, another First Circuit case, acknowledged a lack of clarity in this standard. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 827 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560, 211 (2021). This court consolidated *Glik* and *Gericke*, saying their settings encompass "inescapably public spaces" like "traffic stops" and "public parks," but neither case confirmed nor denied the capacity of a "publicly accessible private property" to count as a "public space." *Id.* In *Fordyce v. City of Seattle*, an individual was arrested after filming police officers and their interactions with a crowd at a protest. *Fordyce v. City of Seattle*, 55 F.3d 436, 438 (9th Cir. 1995). After his charges were dismissed, he brought an action against the city for violation of his first amendment rights. *Id.* The court in this case ruled the plaintiff had a "First Amendment right to film matters of public interest." *Id.* at 439.

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Glik and *Gericke* have both affirmed a right to record in "public." This is useful because it effectively includes public property, which was the setting for both cases. Part of Whitten's charges include her recordings made on public property, in the back of a police car. This setting qualifies as a public space that is "inescapably" public, as it matches up to the *Rollins* standard closely. The interior of a moving police car is hardly different from the traffic stop in *Gericke*. Both take place on public property, and can be viewed by anyone on the street. Thanks to elaboration on the public area constraint from *Gericke*, Whitten's recording inside a publicly-owned police car is very closely analogous to the car in *Gericke* and requires almost no speculation as to whether this location is included in *Glik*. Therefore, Whitten's filming inside a publicly-owned police car is included in the rights affirmed in *Glik*.

However, these cases have not elaborated on whether this includes privately-owned property that acts as a public forum, like the site of Whitten's protest. Whitten's public protest took place at Wild Animal Safari, and included over twenty individuals. (R. at 3–4.)

The analysis in determining whether police should be free from recordings on private property is a determination of what, if anything, has changed in the transfer of setting from public to private property. In other words, the question is whether police officers should have more of a right to privacy, and whether the public has any less of an interest in observing their behavior.

Individuals are only afforded the right to record police officers while they are performing their duties. Just as this public interest no longer exists while their

duties are not being performed, it exists perpetually as long as police duties are being performed. The public has no less interest in sharing and discussing government action on private property than on public property.

The protest at Wild Animal Safari utilized private land as a public forum, and was meant to be seen and heard. The setting of *Fordyce* was a protest that took place on public property. Whitten filmed police interactions like the plaintiff in *Fordyce*. There is no practical reason to separate these two cases besides the simple labels of "public" and "private" property. Functionally, Wild Animal Safari's private property acted in the same way as the public property in *Fordyce*. Just as a police officer would not expect his actions to be private in the protest in *Fordyce*, he could not reasonably expect his actions to be private at the Wild Animal Safari protest. Therefore, police expectation of privacy remains unchanged.

One's right to record police performing their duties in public areas is not contingent on whether a location is public or private, but the function of this location. Police officers performing their duties still have trust placed in them, no matter what sort of property they are on. Therefore, the individual right to record police officers performing their duties should extend to private property that acts as a public space.

3. The right to record should not be limited to third-parties.

In *Glik*, in addition to affirming a general right to record police officers performing their duties in public spaces, the court mentioned that this right is subject to "reasonable time, place, and manner restrictions." *Glik*, 655 F.3d at 84.

The *Glik* court stated that the individual recorded police officers "from a comfortable remove" and didn't "molest them in any way," so his actions satisfied this requirement. *Id*. This standard is shared by *Smith*. *Smith*, 212 F.3d at 1333.

These cases raise potential questions regarding who might be able to record police interactions because they involve third parties filming an arrest, not the actual person being arrested.

The reasonable time, place, and manner restrictions mentioned in *Glik and Smith* indicate that the right to record is also limited in scope to non-intrusive recordings. This is the source of the line "from a comfortable remove" in *Glik*. The purpose of this was not to say police interactions can only be filmed from a "comfortable remove," but that the individual in *Glik* could not have overstepped his constitutional right to record. The ways a person can interfere with an arrest are tremendously limited when that person films from a distance. Filming up-close as a third party presents at least a physical obstacle for police duties. However, this is irrelevant in Whitten's case. Whitten is filming as she is getting arrested. Because the officers did not realize she was recording until she was being searched, Whitten's recording clearly did not interfere with the arrest in any significant way.

The First Amendment right made out in *Glik* and *Smith* was never meant to be exclusively enjoyed by a third-party. Non-intrusiveness, not distance, is the qualifier in these cases, and Whitten falls into this category. A person being arrested has just as much of a right to film police officers performing their duties in

public spaces as anyone else, contingent only upon the time, place, and manner in which the filming is conducted.

CONCLUSION

This Court should reverse the Garner Supreme Court's decision and remand the case for further proceedings. The Garner statute's goal of individual privacy cannot be justified without reference to the category of content it bans. Therefore, it must survive strict scrutiny.

Even if this argument is not accepted, the Garner statute violates Whitten's First Amendment rights and survives neither strict nor intermediate scrutiny. There is a clear pattern in numerous circuits that shows a constitutional right to record police officers performing their duties in public places. Whitten recorded police officers in a reasonable manner, place, and time. This Court should affirm the right established in the First Circuit to preserve free discussion of government affairs.

Respectfully submitted,

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CERTIFICATIONS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief for Petitioner was served on all parties on March 14, 2022, by depositing the briefs in the U.S. Mail, postage prepaid or by personal delivery.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4993 words, including every page except appendices.

Respectfully submitted,

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